IN THE

# Supreme Court of the United States

**October Term, 1921.**

No. 202

---

GREAT NORTHERN RAILWAY COMPANY and JOHN BARTON PAYNE, Director General of Railroads, *Petitioners*,

v.

MERCHANTS ELEVATOR COMPANY,

---

On Writ of Certiorari to the Supreme Court of the State of Minnesota.

---

## BRIEF FOR RESPONDENT

---

HAROLD G. SIMPSON,
*Attorney for Respondents.*

WASHINGTON, D. C., April , 1922.

INGLE, INC., 165 William Street, New York City.

# INDEX



## List of Cases Cited

IN THE

# Supreme Court of the United States

**October Term, 1921.**

No. 202

---

GREAT NORTHERN RAILWAY COMPANY and JOHN BARTON PAYNE, Director General of Railroads, *Petitioners,*

v.

MERCHANTS ELEVATOR COMPANY.

---

On Writ of Certiorari to the Supreme Court of the State of Minnesota.

## *BRIEF FOR RESPONDENT.*

### *Statement of Case.*

Respondent adopts the statement of the case as set forth in the brief of petitioners as substantially correct, with the exception that the letters referred to on pages eight and nine of petitioners' brief were an informal decision of the Interstate Commerce Commission, its number 74618. The letter of Mr. Eastman, Commissioner, to Mr. Chambers, Director of Traffic of the United States Railroad Administration, was referred to and incorporated as a part of that decision. Respondent, in the Court below, cited the informal decision of the Commission as an authority in its favor on the construction of the tariff.

There is but one question before this Court, and that is, did the State Courts of the State of Minnesota have jurisdiction of the subject matter of this action?

# BRIEF.

## I.

Petitioners have filed an exhaustive brief quoting from and analyzing many decisions bearing directly or indirectly upon this question. Therefore, respondent will shorten its brief as far as possible by omitting repetitions of quotations, which have been set forth in the brief of petitioners. Respondent wishes to emphasize that it *agrees entirely with every decision of this Court cited by petitioners;* agrees that the quotations from the cases cited by petitioners are correct and respondent is willing to adopt them in toto, but respondent further wishes to impress upon this Court *that it does not agree with the distinctions, inferences and conclusions drawn by petitioners* from these same cases. Respondent sees absolutely *no conflict* between any of the decisions of this Court bearing on this point and believes that the only *apparent* conflicts are due to the erroneous inferences and conclusions drawn from these cases in the brief of petitioners.

## II.

The rule governing the question of jurisdiction here presented is well settled. It is simple and easy of application and if that rule is correctly stated and applied to each case, it will be found there is no conflict of the authorities and that the questions which must be submitted to the Commission before an action is brought in court and those on which an action may be commenced in a court of law, in the first instance, are clearly distinguished and defined. That rule, briefly stated, is as follows:

> *Where a shipper attacks a rate, charge or rule as unreasonable, discriminatory, prejudicial or*

*preferential, there is an administrative question raised which must first be determined by the Commission, but where a shipper makes no such attack upon a rate, charge or rule, but merely contends that the rate or charge was not authorized by the duly published tariffs or that the rules are not applicable, or have been applied in an unlawful manner, then it is a question which it is proper for courts of law to determine in the first instance.*

This same rule may be stated in several other ways, and perhaps some of these are shorter and more easily applied.

*1. The Commission has original jurisdiction of charges involving an administrative question, but the courts have original jurisdiction of charges or rates, which are illegal per se.*

All rates or charges prohibited by the Interstate Commerce Act are, of course, illegal, but there are certain rates or charges which become illegal only after they have been declared unreasonable, prejudicial or preferential, but there are other charges which violate or are in excess of a duly filed and published tariff. To make a charge in excess of such published tariff is illegal on its face. Although both classes of excessive charges are unlawful, the first class is not illegal until such charge is declared unreasonable, prejudicial or preferential by the Interstate Commerce Commission, for the reason that it requires the administrative ability and functions of that tribunal to so find. However, if a carrier arbitrarily makes a charge in excess of its legal and lawfully published tariffs, that charge is illegal and unlawful *per se*, for the reason that it is specifically prohibited by law. There is no administrative question involved, and for that reason it is within the jurisdiction of a court of law to require the carrier to refund such an overcharge without resort to the Commission in the first instance. There is nothing for the Commission to decide. It is only a

question of law and fact as to whether or not the carrier has charged more than the legal rate, as provided in its tariffs.

> 2. The Interstate Commerce Commission has exclusive original jurisdiction to determine the reasonableness of a rule or rate, but the courts have original jurisdiction to determine the construction and application to the facts.
>
> 3. The Commission has original jurisdiction to put in or take out a rate or rule, but the courts have original jurisdiction to construe or apply a rate or rule already published.
>
> 4. The Commission has original jurisdiction to determine administrative facts, but the courts have original jurisdiction to determine the meaning of words, tariffs or rules.
>
> 5. The Commission has original jurisdiction to formulate a rate or rule, but the courts have original jurisdiction to interpret and apply such rates or rules after their publication.

These are all another manner of stating the principle which governs the case in question. By the application of any of these rules of thumb to the cases of this Court, it will immediately appear that all the cases decided by this Court, as well as subordinate courts, will fall naturally into two classes, and there will be no conflict between the same.

## III.

By applying the rule or rules above stated, the cases falling into the first class or the class in which the Commission has original jurisdiction and on which *petitioners* mainly rely, are as follows:

> *T. & P. Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S., 426;
>
> *B. & O. R. R.* v. *Pitcairn Coal Co.*, 215 U. S., 481;

*Robinson* v. *B. & O. R. R.*, 222 U. S., 506;
*Mitchell Coal Co.* v. *Penn. R. R.*, 230 U. S., 247;
*Morrisdale Coal Co.* v. *Penn. R. R.*, 230 U. S., 304;
*T. & P. R. R. Co.* v. *American Tie & Timber Co.*, 234 U. S., 138;
*Penn. R. R. Co.* v. *Clark Coal Co.*, 238 U. S., 456;
*Loomis* v. *Lehigh Valley R. R. Co.*, 240 U. S., 43.

## IV.

The cases decided by this Court which fall under the second part of the rule, as above stated, over which courts of law have primary jurisdiction and on which *respondents* rely, are as follows:

*Penn. R. R. Co.* v. *Puritan Coal Co.*, 237 U. S., 121;
*Eastern Ry. Co.* v. *Littlefield*, 237 U. S., 140;
*I. C. R. R. Co.* v. *Mulberry Coal Co.*, 238 U. S., 275;
*Penn. R. R. Co.* v. *Sonman Coal Co.*, 242 U. S., 120;
*Penn. R. R. Co.* v. *Kittanning Co.*, 253 U. S., 319;
*St. L., Iron Mountain & So. Ry. Co.* v. *Hasty*, 255 U. S., 252;
*Penn. R. R. Co.* v. *Stineman*, 242 U. S.

## V.

Some of the decisions of the State Courts and Subordinate Federal Courts which are direct authorities in favor of respondent and also fall within the second class are the following:

*Reliance Elev. Co.* v. *C. M. & St. P. Ry Co.*, 165 N. W. (Minn.), 867;
*Gustafson, et al.*, v. *Mich. Cent. R. R. Co.*, 129 N. E., 516;
*Wolverine Brass Works* v. *So. Pac. Co.*, 153 N. W., 778;
*Natl. Elev. Co.* v. *C. M. & St. P. R. R. Co.*, 246 Fed., 588;
*Francisconi* v. *B. & O. R. R. Co.*, 274 Fed., 687;
*Empire Refineries* v. *Guaranty Trust Co.*, 271 Fed., 668;
*Hite* v. *Central R. R. of N. J.*, 171 Fed., 370;
*Natl. Coal Co.* v. *C. & N. W. R. R. Co.*, 211 Fed., 65;
*Gimbel Bros.* v. *Barrett*, 215 Fed., 1004;
*C., B. & Q. R. R. Co.* v. *Feintuch*, 191 Fed., 482;
*Kansas City Southern R. R. Co.* v. *Ponn*, 143 S. W., 577;
*Hardaway* v. *So. Ry. Co.*, 73 S. E., 1,020;
*W. & A. R. Co.* v. *White Provision Co.*, 82 S. E., 644;
*So. Pac. Co.* v. *Erye & Bruhn*, 143 Pac., 163;
*St. L., S. F. & T. Ry. Co.* v. *Roff Oil Co.*, 128 S. W., 1194;
*Laning-Harris Coal Co.* v. *St. L. & S. F. Ry. Co.*, 15 I. C. C., 37.

It is the contention of respondents that the case at bar falls clearly within the second provision of the rule and is governed by the last cases cited.

# ARGUMENT.

## I.

**Petitioners in this case are asking for a further limitation of the clear and unmistakable wording of the Interstate Commerce Act.**

Petitioners in their brief repeatedly refer to the case at bar as a limitation upon the case of *Texas & Pacific Railway Company* v. *American Tie & Timber Company* 234 U. S., 138), but what Petitioners are really asking for is not a limitation upon that case, but an *extension* of the doctrine of that case and a *revolutionary limitation* of not only the Interstate Commerce Act but the *Judicial Code* contained in the Constitution of the State of Minnesota, which is guaranteed by the Federal Government.

Section 9 of the Interstate Commerce Act provides in part as follows:

> "That any person or persons claiming to be damaged by any common carrier subject to the provisions of this Act, may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any District or Circuit Court of the United States, of competent jurisdiction, but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt * * *."

In addition to the jurisdiction conferred on the Federal Courts by Section 9, just quoted, Section 22 of the Act makes the following sweeping provision.

> "And nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute but the provisions of this Act are in addition to such remedies."

There can be no question but that at the common law the State Courts of Minnesota would have had jurisdiction of the case at bar. The Interstate Commerce Act not only did not repeal any common law remedies, but expressly, in unequivocal language, reserved to the shipper all his common law remedies. That being the case, the only limitation which can be placed upon the shipper to sue a common carrier in a court of law must be implied and, it being implied, the implication overruling the express terms of the statute must be limited as far as possible, and with the greatest care.

After the passage of the Interstate Commerce Act and its several amendments, it was found necessary to make an implied restriction on Sections 9 and 22, above quoted, and this restriction was finally made by this Court in the case of *Texas & Pacific Railway Co.* v. *Abilene Oil Co.* (204 U. S., 426). This case is the authority and the basis for any and all restrictions or limitations subsequently laid down by this Court and others.

The *Abilene* case was an action brought before a court in the first instance to declare a properly filed and published rate unreasonable. The *Abilene* case prohibits primary or original jurisdiction of courts of law to declare in the first instance that an existing rate or rule is unreasonable and therefore void. This Court based its judgment upon the argument of uniformity of rates which, in the case at bar, is strenuously urged by Petitioners, and upon which Petitioners rely. And it was a necessary and proper limitation, but it is a limitation only upon the power of a court to declare a rate or rule unreasonable, preferential or prejudicial before the Interstate Commerce Commission has passed upon that proposition, for the reason that there is an administrative question involved. By the application of the rule before stated, the *Abilene* case falls naturally into the first class.

The following cases, relied upon by Petitioners to sustain their position, all fall directly within the limitation

laid down by the *Abilene* case, and do not in any way increase that limitation:

*B. & O. R. R.* v. *Pitcairn Coal Co.* (215 U. S., 481);
*Robinson* v. *B. & O. R. R.* (122 U. S., 506);
*Mitchell Coal Co.* v. *Penn. R. R. Co.* (230 U. S., 247);
*Morrisdale Coal Co.* v. *Penn. R. R. Co.* (230 U. S., 304);
*Penn. R. R. Co.* v. *Clark Coal Co.* (238 U. S., 456).

A glance at these cases just cited will show that they are all within the doctrine of the *Abilene* case, and in no way extend that doctrine. As has already been pointed out, the *Abilene* case was a direct attack upon a published rate, on the ground that it was unreasonable, and this Court properly held that this was an administrative question first to be determined by the Commission. In other words, the *Abilene* case falls within class one or the first part of the rule quoted in Section II of the brief.

The case of *B. & O. R. R.* v. *Pitcairn Coal Co.* was a direct attack upon a rule already published and filed, which the shipper claimed was discriminatory. Again it being an attack upon the rule itself, and not a mere question of the application or construction of the rule as published, there was an administrative question raised and under the holding of the *Abilene* case it was properly placed in class one. The case of *Morrisdale Coal Co.* v. *Penn. R. R. Co.* is identical, and the case of *Robinson* v. *B. & O. R. R.* is also identical, except that in that case there was an attack on a *rate* as discriminatory instead of a rule.

The case of *Penn. R. R. Co.* v. *Clark Coal Co.* is on all fours with the *Pitcairn* and *Morrisdale* cases, except that in the *Clark* case there had been an award by the Commission in the first instance, and the plaintiff attempted

to treble that award under a state statute. This case, without further discussion, is governed by Section 9 of the Act, in that the plaintiff had chosen his remedy and must abide by that decision.

In the case of *Mitchell Coal Co.* v. *Penn R. R. Co.* the plaintiff made an attack upon certain allowances made by the defendant to other shippers for services rendered to the defendant by those other shippers. In that case the carrier took the position that the allowances were proper and reasonable and had been established by long custom and practice. It is, of course, well recognized that a custom and practice not contrary to an express tariff provision is lawful, therefore, immediately the question arose as to whether or not the allowances made to other shippers were reasonable and non-discriminatory. This was a question for the commission to pass upon in the first instance, and the *Mitchell* case is in no way an extension of the rule laid down in the *Abilene* case.

Respondent reiterates that it believes that the principle in the *Abilene* case was a proper one for this Court to find and, inasmuch as all the cases just referred to coincide with the *Abilene* case, respondents believe that they are all correctly decided. However, they are merely authorities in support of the first part of the rule as stated by respondent in Section II of his brief, namely:

> "Where a shipper attacks a rate, charge or rule as unreasonable, discriminatory, prejudicial or preferential there is an administrative question raised which must first be determined by the Commission."

But the respondent in the case at bar has made no attack in any way whatsoever upon any rate, rule or charge as unreasonable, discriminatory or prejudicial, but merely claims that there was no tariff authority of any kind for the exaction of the charge for the recovery of which this action was brought. The case at bar therefore does not fall within the first class or the first part of

the rule above quoted, or is not governed or controlled in any way by the cases just referred to.

There has been by this Court but one *apparent* extension of the doctrine laid down in the *Abilene* case. This *apparent* extension of the *Abilene* case is made in the cases of *Texas & Pacific R. R. Co.* v. *American Tie & Timber Co.* (234 U. S., 138), and the case of *Loomis* v. *Lehigh Valley R. R.* (240 U. S., 43). The first of these cases is the one upon which petitioners place such reliance and contend that it controls the case at bar. The *Loomis* case is identical in principle with the *American Tie* case, and the two may be considered together.

It will be readily seen upon a reading of the *American Tie* case that it does not hold what petitioners claim, but in reality merely follows the *Abilene* case.

In the *American Tie* case the shipper contended that crossties should move as lumber under the lumber rate. There was in fact no rate named in any tariff to cover crossties. Therefore, the shipper was attempting to prove that crossties should take the lumber rate. It appeared, however, that there was a question as to whether or not crossties were lumber, but, moreover, a more serious question, should they take the same *rate* as did ordinary lumber? As a matter of fact, the shipper was asking the Court *to name or establish a rate on a commodity for which there was no rate in existence.* To establish or promulgate such a rate in the first instance would be calling upon the Court to use administrative powers conferred upon the Commission, for the reason that the Court must, in naming or establishing such a rate, pass upon the question as to whether or not the rate that it did name was reasonable and was not discriminatory or prejudicial. This case has caused confusion simply for the reason that the Court did not specifically state, as it did in the *Loomis* case:

> "In the last analysis the instant case presents a problem which directly concerns *rate making,* and is peculiarly administrative."

In the case of *Gimbel Bros.* v. *Barrett* (214 Fed., 1004), the distinction is well stated by the Court as follows:

> "The latest case on the subject to which we have been referred, that of *Texas, etc., R. Co.* v. *Tie Co.*, 234 U. S., 138 (34 Sup. Ct., 885), affords another illustration of the same distinction. There the complaint was the refusal of the railroad to transport ties in pursuance of an alleged purpose to limit their sale market. The objection to any action by the court was that no rate for ties had been filed by the carrier, and, in consequence, no charge could be made for such service. There was a rate for lumber, and the question was whether this applied to ties. The court held this question 'was one to be primarily determined by the commission' in the exercise of the powers conferred upon it by Congress because the real purpose to be accomplished was an administrative purpose."

The *Loomis* case is identical in principle with the *American Tie* case. In the *Loomis* case a shipper attempted to recover for material and labor used in the coopering of cars. This Court in that case properly found that there was no rule or rate *named in any tariff* which would allow a refund or recovery for this expense. If the courts allowed for this expense it would naturally follow that they would be interfering or changing the rate on a particular commodity, as it would be necessary for the carrier to raise its rate to cover this additional expense or to cover the furnishing of special equipment for this particular commodity. The Court was called upon to primarily fix or establish a rate, as it was in the *American Tie* case, and properly followed that case.

## II.

## Uniformity.

Petitioners rely primarily upon the *American Tie* case, but quite as strenuously argue the broad principle of uniformity of rates. Respondents admit that this is a broad principle and one that should be taken into consideration by this Court, and it was so taken into consideration and is the basis of the *Abilene* case, which this Court fully discussed as quoted in petitioner's brief (P. B., p. 27). But, as there pointed out, only in a case of *absolute necessity* should a Court limit the common law and the express wording of a statute by *implication*, and there is no such necessity in the case at bar.

The Court will note upon a careful analysis of every single case in which this question has arisen that the basis of the argument against the jurisdiction of the court at law has been this same uniformity of rates. In many of the decisions this argument appears, in the others a glance at the briefs will show that it has been strenuously advocated, particularly has it been urged in the cases considered by this Court which have been decided *adversely* to the petitioners. Therefore, this Court, having carefully considered the same, this respondent should not be obliged to argue at length the question of uniformity of rates.

However, respondent deems it advisable to call to the attention of this Court a few of the reasons which clearly demonstrate that a primary finding by a court of law in the case at bar will not in any way interfere with any rate structure or uniformity of rates.

The Court's attention is called to the fact that the only possible ground for the decision in the *Abilene* case is this same argument for uniformity of rates, and insofar as the *Abilene* case went, respondent agrees that it was a necessary though possibly drastic limitation upon

the express wording of the Interstate Commerce Act and the Constitutions of the several States. The Court points this out clearly in the *Abilene* case, but there is no reason for extending indefinitely limitations based upon this argument.

For all the voluminous argument of counsel for uniformity of rates in making objections to the jurisdiction of courts of law in such cases as the one under consideration; since the passage of the Act there never has been created any non-uniformity of rates. There is only one instance in all the cases decided by all the courts of the United States in which the same tariff or the same rate has come up for consideration by two courts. These cases are *National Elevator Co.* v. *C., M. & St. P. R. R. Co.* (246 Fed., 588), decided by the Circuit Court of Appeals for the Eighth Circuit, and the case of *Reliance Elevator Co.* v. *C., M. & St. P. R. R. Co.* (165 N. W., 867), decided by the Supreme Court of the State of Minnesota, which last case is quoted at length in petitioner's brief and upon the authority of which the same Court decided the case at bar. In those two cases the defendant and tariff were the same and the Supreme Court of the State of Minnesota did not hesitate, even without discussion, to follow the Circuit Court. *In other words, the phantom of non-uniformity of rates raised and argued so strenuously in this case has never, since the passage of the Interstate Commerce Act, become a reality.*

But viewing it from a practical standpoint, it would be impossible to establish in a case such as this any actual difference in rates where the attack is made upon an actual published tariff or charge. Where the attack is made on a rule or charge as unreasonable, prejudicial or discriminatory, it may readily be seen that if this question were left to local courts that those courts, swayed by bias or over-enthusiasm for local communities, could give an unreasonable, prejudicial and discriminatory advantage to their own communities to the detriment of other States and a burden on Interstate Com-

merce. That is, if allowed to, a court in Minnesota could establish a rate between Minneapolis and Chicago so low that it would destroy the competing markets of Omaha and Kansas City. It would then follow that the courts of Nebraska and Missouri would retaliate by finding the rates from Omaha and Kansas City to Chicago unreasonable, on the perfectly sound ground of the comparison with the rates from Minneapolis to Chicago, hence absolutely destroying the uniformity of rates and creating an unbearable burden upon other localities engaged in Interstate Commerce. This is the reason for the *Abilene* case and the other cases which follow in its footsteps, and this is the reason which makes the *Abilene* case, though somewhat violent to express statutes, still absolutely sound in principle.

But in the case at bar the petitioners arbitrarily extorted from the respondents and a large number of shippers in the same territory, a charge of $5 a car without performing any service for the same. This is an individual overcharge against specific and individual shippers which has no bearing whatsoever upon any uniformity of rates or rate structure.

Even presuming that the Supreme Court of Minnesota is wrong in its interpretation and application of the tariff in question, in what way has the uniformity of rates been destroyed? The petitioners may be sued in the State of Minnesota by any shipper or citizen of the United States or foreign countries, and the courts of that State will in conformity with the decision in this case, order the petitioners to make the identical refund which it has ordered to respondents. Is there any interference with the uniformity of rates under these circumstances? This is a tariff covering not only the entire line of petitioner, the Great Northern Railway Company, but at that time the entire western territory through the Director General of Railroads and the United States Railroad Administration. Every railroad hauling grain in that territory was forced by the order of the Interstate Commerce Commis-

sion to publish the suspension order here under consideration. The tariffs were identical, and Commissioner Eastman advised Mr. Chambers, Director of Traffic of the United States R. R. Administration during this particular time, that the interpretation of this suspension order contended for by respondents was correct. There were only three of the ten systems entering the city of Minneapolis which exacted this illegal charge (Tr., 42). Respondents are forcing a *uniformity* of rates, not an interference with them.

By the decision rendered by the Supreme Court of Minnesota rates were made uniform, and so it must be in every single case of an interpretation of the tariff for the reason that any member of the shipping public may bring his action in the State of Minnesota and obtain the identical refund, against the identical defendant, under the identical tariff, under the identical decision here appealed from. Nor can there be a case imagined where the interpretation of a tariff is involved that this same result cannot and will not be achieved.

It therefore appears plainly that this Court has time and time again considered the advisability of a further limitation upon the express wording of the Interstate Commerce Act, based upon this same argument of uniformity and has continuously denied the same except in so far as the *Abilene* case goes. Respondent merely points out the few points above to show that it is an impossibility in case a court in the first instance interprets the meaning of a published tariff to in any way interfere with the uniformity of rates either as to localities or as to individual shippers.

## III.

**The case at bar is clearly sustained by the cases cited in the brief and is a case over which the courts have primary jurisdiction.**

It is the contention of respondent that the State courts of Minnesota clearly had jurisdiction to decide the question in controversy, and respondent is supported in that contention by the authorities before cited. It is true that petitioners attempt to distinguish and draw inferences from these cases which respondent does not believe exist, and respondent is willing to base his case entirely upon the wording of the Court.

As before pointed out, the *Abilene* case is a limitation upon the common law and the clear wording of the Interstate Commerce Act. The first case in this court clearly refusing to extend this limitation is the case of *Penn. R. R. Co.* v. *Puritan Coal Co.* (237 U. S., 121). The holding of this case is clearly shown by the following quotation:

> "There are several decisions, already cited, which hold that suits against railroads for unjust discrimination in Interstate Commerce can only be brought in the Federal Courts. But it must be borne in mind that there are two forms of discrimination—one in the rule and the other in the manner of its enforcement; one in promulgating a discriminatory rule, the other in the unfair enforcement of a reasonable rule.
>
> But if the carrier's rule, fair on its face, has been unequally applied and the suit is for damages, occasioned by its violation or discriminatory enforcement, there is no administrative question involved, the courts being called on to decide a mere question of fact as to whether the carrier has violated the rule to plaintiff's damage. Such suits, though against an Interstate Carrier for damages arising in Interstate Commerce, may be prosecuted either in the State or Federal Courts. * * * In the distribution of cars to coal compa-

nies, it might be necessary to determine whether account should be taken of system cars, foreign cars, private cars and the company's own coal cars. In many cases the determination of such an issue would call for the exercise of the regulating function of the Commission. That was true in *Morrisdale Coal Co.* v. *Pennsylvania Railroad*, 230 U. S., 304, 312-314. There the plaintiff admitted that it had received all the cars to which it was entitled under the carrier's rule, but it insisted that the rule itself was unreasonable and unjustly discriminatory, since it took no account of private and foreign cars controlled by the mining company. The reasonableness of the rule was a matter for the Commission.

The present suit, however, is not of that nature. It is not based on the ground that the Pennsylvania Railroad's rule to distribute in case of car shortage on the basis of mine capacity, was unfair, unreasonable, discriminatory, or preferential. But as shown above, the plaintiff alleged it was damaged by reason of the carrier's failure to furnish it with cars to which it was entitled. In support of that issue of fact, the plaintiff relied on the carrier's own rule as evidence. That rule, and the carrier's distribution sheets, showed the number of cars to which the plaintiff, the Berwind White Company and other coal companies in the district, were each entitled. The evidence further showed that the plaintiff did not receive that number of cars to which by rule it was thus entitled. So that on the trial there was no administrative question as to the reasonableness of the rule, but only a claim for damages occasioned by its violation in failing to furnish cars (*Penna. R. R. Co.* v. *International Coal Co.*, 230 U. S., 197). The State and Federal Courts had concurrent jurisdiction of such claims against an Interstate Carrier without a preliminary finding by the Commission."

The contention of petitioners that the *Puritan* case was decided purely on the ground of the pleadings is without merit, as the language above quoted shows. If the facts were admitted, why take evidence and make findings?

The *Puritan* case was immediately followed by the *Eastern Ry. Co.* v. *Littlefield* (237 U. S., 140). This case is on all fours with the *Puritan* case, and is a direct authority in support of that case, and is a refusal to further extend the doctrine of the *Abilene* case.

Again these two cases are followed and cited by the case of *Ill. Cent. R. R. Co.* v. *Mulberry Coal Co.* (238 U. S., 275), and even petitioners are unable to explain the holding of this case or to reconcile it with their contention. Their only explanation of the case is as follows:

> "In fact the petitioners are again forced to the conclusion that the Mulberry decision can only be accounted for by the peculiar nature of the pleadings in that case and by the failure of this court to recognize in that case what it has already recognized in the Eastern Ry. Company, that the *Puritan* case itself was controlled by the nature of its own pleadings" (P. B., 63).

Certainly the case of *Penn. R. R. Co.* v. *Sonman Company* (242 U. S., 120), is squarely in point and the ruling authority governing the case at bar, which is shown by the following quotation from that case:

> "That the act does not supersede the jurisdiction of state courts in any case, new or old, where the decision does not involve the determination of matters calling for the exercise of the administrative power and discretion of the Interstate Commerce Commission, or relate to a subject as to which the jurisdiction of the Federal courts is otherwise made exclusive, *ibid.*, 130; that claims for damages arising out of the application, in Interstate Commerce, of rules for distributing cars in times of shortage, call for the exercise of the administrative authority of the Commission where the rule is assailed as unjustly discriminatory, but where the assault is not against the rule but against its unequal and discriminatory application, no administrative question is presented and the claim may be prosecuted in either a Federal or a State Court without any precedent action by the Com-

> mission, *ibid.*, 131-132; and that, if no administrative question be involved, as well may be the case, a claim for damage for failing upon reasonable request to furnish to a shipper in Interstate Commerce a sufficient number of cars to satisfy his needs, may be enforced in either a Federal or a State Court without any preliminary finding by the Commission, and this whether the carrier's default was a violation of its common law duty existing prior to the Hepburn Act of 1906, or of the duty prescribed by that Act, *ibid.*, 132-135; *Eastern Ry. Co.* v. *Littlefield*, 237 U. S., 140, 143; *Illinois Central R. R. Co.* v. *Mulberry Hill Coal Co.*, 238 U. S., 275, 283; *Pennsylvania R. R. Co.* v. *Clark Coal Co.*, 238 U. S., 456, 472."

Even petitioners at page 64 of their brief make the following admission:

> "The case of the *Penn. R. R.* v. *Sonman Co.*, 242 U. S., 120, the petitioners must confess they are unable either to distinguish or reconcile with any other decision of this court."

What petitioners really mean to say is that they are unable to distinguish the *Sonman* case from the case here under consideration. The *Sonman* case is an absolute authority and in itself without further discussion is sufficient to sustain the jurisdiction of the courts of the State of Minnesota in the case at bar. In the *Sonman* case the action was brought to determine the application of a car distribution rule, while the case at bar is based upon the interpretation and application of a re-consigning rule. In the *Sonman* case the plaintiff recovered for failure to observe this rule. In the case at bar the plaintiff and respondent is merely asking that petitioners refund charges unlawfully and illegally extorted and collected in excess of the duly filed and published rule governing re-consigning.

Following this is the case of *Penn. R. R. Co.* v. *Kittanning Co.* (253 U. S., 319), which is also on all fours with

the case at bar and controls the same, the only difference being that in that case the carrier was plaintiff instead of the shipper. To make a distinction in the rule on this basis is a logical impossibility.

Follows the case of *St. L., Iron. & So. R. R.* v. *Hasty,* 255 U. S., 252. It is true that this case involved the construction of state rates instead of interstate; but it was decided under an act similar to the Interstate Commerce Act, and if the principle of uniformity of rates applies to state rates, the same principle is applicable to interstate rates, the latter simply being on a larger scale and under the control of the Federal Government rather than the State Government.

The cases of *Wight* v. *U. S.* (167 U. S., 512), and *Penn R. R. Co.* v. *International Coal Co.* (230 U. S., 134), are cases involving rebating. They are interesting in that they support the contention of respondent that a court of law has original jurisdiction of any case against a carrier which is unlawful on its face or illegal *per se.* In both these cases, unlawful rebates were given to other shippers, and this Court held that it had jurisdiction to determine the damages suffered by plaintiffs due to rebating. They are both clearly distinguishable from the *Mitchell* case, because these two cases are straight rebate cases, while the *Mitchell* case involved the payment for services and there was in that case the question as to whether or not the payment for the services was a reasonable one.

The above cited cases are the ones decided by this Court upon which respondent mainly relies, as all these decisions clearly lay down the rule stated in the brief, and the proper application of that rule to the case at bar must necessarily decide the same in respondent's favor.

Before passing to the consideration of the cases decided by state courts and Subordinate Federal courts, respondent calls the attention of this Court to the Interstate Commerce Commission's own opinion on this precise point, and it will be noted that the Commission not only

specifically holds that a court of law has jurisdiction in the first instance in the case at bar, but further than that expresses doubt as to whether the Commission has any jurisdiction at all. But finally holds that it has such jurisdiction upon the ground that a charge in excess of the duly filed and published tariffs is an unreasonable charge, thereby giving the Commission jurisdiction. This position of the Commission is best expressed in the case of *Laning-Harris Coal Co.* v. *St. L. & S. F. R. R. Co.*, 15 I. C. C., 37, from which we quote as follows:

> "Whether the Commission has authority to award damages in a case where a carrier collects a greater sum on an interstate shipment than is fixed by its published tariffs, or whether the shipper must seek his remedy in the courts, presents a question somewhat more difficult. But upon consideration of the various provisions of the Act, it is believed that the question should be resolved in favor of the Commission's authority to make such an order. The Commission is authorized to award reparation to any person or persons found to be damaged by any common carrier subject to the provisions of the act, for a violation thereof. One of the leading prohibitions of the act is that against the exaction of an unreasonable rate, and it is well settled that the Commission has authority to award reparation in case of the exaction of an unreasonable rate. As against the carrier, its published tariff rate is conclusive of the fact that any higher rate is unreasonable. It seems fairly certain that in cases of the exaction of a rate higher than the published tariff, the shipper may bring his suit in court in the first instance, but the act also appears to give the commission and the courts concurrent jurisdiction in this respect. An order will therefore be entered requiring defendant to pay to complainant the amount of the admitted overcharge. In arriving at this conclusion we are not unmindful of the fact that to enforce our order complainant may have to go into a court which has authority to allow the set-off alleged by the railroad company, and this may entirely defeat recovery by

complainant under the order, if the set-off is held to be a good defense. But such a difficulty seems unavoidable in cases of this kind, where the complainant elects to come before the Commission in preference to suing before a court in the first instance."

All the cases which are cited in Section V of respondent's brief, follow in a general way, the quotations above, and it would seem very peculiar if four Federal Circuit Courts, several Federal District Courts and numerous State Courts should all misinterpret the decisions of this Court. It would appear more probable that the conclusions, inferences and distinctions drawn by petitioners in their brief were erroneous.

In the case at bar respondents are merely seeking to recover a charge collected in excess of petitioners' duly published tariff. If a court has not jurisdiction to determine this question both carriers and shippers could be easily placed in an absurd position. A carrier could make any extortionate charge in excess of its tariff even if the charge was made by error. Then if petitioners' position is correct, all that is necessary when the shipper brings an action to recover this amount is for the carrier to file a general denial, as they did in the case at bar (Tr., p. 3).

In the case at bar, although a general denial was filed to all the allegations in the complaint, there was absolutely no attempt to disprove any of the material facts of plaintiff's case with the exception of the tariff construction. Petitioners naïvely suggest that in such a case where there was no question of doubt that the court would have jurisdiction, but whom would determine whether or not there was a question of doubt. Necessarily, the court before whom the case came would have to determine that question and would have to determine the degrees of doubt. The only other test would be whether or not the defendant filed a general denial. Is it possible that a court of law in such a case as this can be ousted of its Constitutional Jurisdiction by the mere filing of a general denial?

Turn the case around and suppose that respondent, as many shippers do, had refused to pay this illegal charge. How would the carrier collect the same? Petitioners suggest that after the action was commenced that the trial be stopped in its midst and the question referred to the Interstate Commerce Commission for decision. Respondent admits that it is unaware of any statute, rule or practice, admitting of any such procedure. The other suggestion of petitioners to get around this difficulty is that the Commission would make an *ex parte* investigation and determine the matter. The only *ex parte* investigations which the Commission has so far made are those involving matters of nation-wide importance, such as the famous *Ex Parte 74*, which made a general increase of rates throughout the United States. Since its existence the Commission has made less than one hundred of these *ex parte* investigations, and respondents do not believe that they will start making *ex parte* investigations in matters involving $80.

The Interstate Commerce Commission has no jurisdiction or power to award damages against a shipper in favor of a carrier or even to entertain a counterclaim of a carrier in an action by a shipper.

*Laning-Harris Coal & Grain Co.* v. *R. R. Co.*,
15 I. C. C.

If the petitioners' contention is correct, it could not sue this shipper for an undercharge before the Interstate Commerce Commission, nor could it bring its action in a court in the first instance until the Interstate Commerce Commission had construed the tariff. The Interstate Commerce Commission would have no jurisdiction to consider this tariff as against the shipper. There could be nothing involved before the commission but a moot case in which this shipper could not be compelled to

appear and a finding by the Interstate Commerce Commission, even if it would make such a finding, could not in any way be binding on this shipper, because the shipper had not been a party to the action. So that if the carrier's contention as to jurisdiction is correct, a carrier could never collect an undercharge where the shipper claimed a different construction of the tariff.

The respondent realizes that there is ample authority and decisions of this court on which a decision in the case at bar may be based. Respondent, however, has cited a considerable number of cases from State Courts and Subordinate Courts for the mere purpose of demonstrating that all these Subordinate Courts uniformly hold that they have jurisdiction of suits such as the case at bar and for the further reason that in these cases the decisions of this court are quite fully discussed and digested and in each case the Subordinate Court, after a review of the decision of this court, has reached the conclusion for which respondent here contends. A good illustration of this is the case of *Reliance Elevator Company* v. *C. M. & St. P. Ry. Co.*, 165 N. W. (Minn.), 867, which is quoted at length in petitioners' brief at pages 17 to 21, inclusive.

It is further illustrated by the following quotation from the case of *Gimbel Bros.* v. *Barrett* (215 Fed., 1004):

> "The question thus ruled to be within the province of the commission to primariy determine is a different question from that raised by the allegation that a carrier has charged more than or otherwise departed from the published rate. This may involve the meaning of the tariff in order to deetermine the fact of the alleged departure. To hold that the court cannot determine the fact of whether the published rate or more or less than the published rate has been collected in a given case is to take from the courts the jurisdiction committed to them by Congress. Nor is this result changed by the fact of whether the rate be one

> which is fixed by an act of Congress, by a tariff or schedule of rates fixed by being filed by the carrier, or by a ruling by the commission. In any case, the fact of departure from it must be a fact within the province of the court to find, or it can never proceed to render judgment in any case. See also *Louisville, etc., R. Co.* v. *Brewing Co.*, 172 Fed., 117 (96 C. C. A. 322, 40 L. R. A. (N. S.) 789; *St. Louis, etc., R. Co.* v. *Oil & Cotton Co.* (Tex. Civ App.), 128 S. W. 1194; *Western, etc., R. Co.* v. *Provision Co.*, 142 Ga., 246 (82 S. E. 644). We think the court had jurisdiction to determine whether there had been an overcharge under the tariffs as fixed and published."

Another vital objection to petitioners' position is that the Interstate Commerce Commission was not intended to consider such cases as this and that body has not machinery necessary to handle the large volume of straight over and undercharge cases. This court is familiar with the practice and procedure of the commission and it certainly was not the intention to compel shippers to come from the Pacific Coast to Washington to argue matters involving $80. If the Act intended any such procedure it would have provided a means for hearing cases such as is provided by the Federal Judicial Code.

A tariff is merely a contract between the shipper and carrier and is in all respects determined by a court of law under the same rules by which a contract is interpreted. This fact petitioners entirely lose sight of.

Respondent submits to this court that the ordinary judge or court is far more able to interpret and apply the wording of a particular tariff than is the Commission. The suggestion is made by petitioners that this is an interpretation of an Interstate Commerce Commission order. Respondents are willing to submit that courts and judges with their special and peculiar training are far more able to determine the meaning of words or language

than is this same body called the Interstate Commerce Commission. The particular order under consideration was promulgated by the Interstate Commerce Commission and if they cannot draw an order which is not ambiguous, respondent sees no reason why it should not apply to the courts for an interpretation of that order.

As far as circular 18-A is concerned, respondent only remarks that if petitioners had followed directions stated in that circular, this case would not now be before this court for the reason that the said circular provides in substance that the language of a tariff shall be clear to the man of ordinary intelligence.

## *Conclusion.*

It must now appear to this court that the rule governing this question of jurisdiction as stated in the brief of respondent is correct, which rule is as follows:

> *"Where a shipper attacks a rate, charge or rule as unreasonable, discriminatory, prejudicial or preferential, there is an administrative question raised which must first be determined by the Commission, but where a shipper makes no such attack upon a rate, charge or rule, but merely contends that the rate or charge was not authorized by the duly published tariffs or that the rules are not applicable, or have been applied in an unlawful manner, then it is a question which it is proper for courts of law to determine in the first instance."*

By the application of this rule to every case cited it will be found that there is no conflict in the authorities. The cases cited and relied upon by petitioners fall naturally and properly into the first class or first portion of this rule and the cases cited by respondent in support of its contention fall naturally into the second class or last part of this rule.

The case at bar is simply an attempt by respondent to recover from petitioners a charge in excess of petitioners' duly published tariff. It therefore is clearly within the second class of cases and is covered by the latter part of the rule. Therefore, it follows that the State Courts of Minnesota have jurisdiction of this case and the decision of the Supreme Court of the State of Minnesota should be affirmed.

Respectfully submitted,

HAROLD G. SIMPSON,
*Attorney for Respondents.*

WASHINGTON, D. C., April , 1922.

No. 686 202

# Supreme Court of the United States.

OCTOBER TERM, 1920.

---

GREAT NORTHERN RAILWAY COMPANY AND JOHN BARTON PAYNE, Director General of Railroads,
*Petitioners,*

vs.

MERCHANTS ELEVATOR COMPANY,
*Respondent.*

---

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA AND BRIEF IN SUPPORT OF SAME.

---

JOHN F. FINERTY,
F. G. DORETY,
Attorneys for Petitioners.

# Supreme Court of the United States.

OCTOBER TERM, 1920.

---

GREAT NORTHERN RAILWAY COMPANY AND JOHN BARTON PAYNE, Director General of Railroads,
*Petitioners,*

vs.

MERCHANTS ELEVATOR COMPANY,
*Respondent.*

---

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

---

*To the Honorable Supreme Court of the United States:*

The petition of the Great Northern Railway Company and of John Barton Payne, Director General of Railroads respectfully shows to this honorable court:

The purpose of this petition is to ask the court to determine conflicting constructions of various

state and lower federal courts, and to resolve disputes which have arisen, as to the true intent and effect of the decision of this court in the case of the American Tie Company vs. Texas & Pacific Railway Co., 234 U. S. 138, and to determine whether, and to what extent, a state court has jurisdiction to adjudicate a disputed question of railway tariff construction. Since that decision, state and lower federal courts have come to diametrically opposite conclusions, both purporting to follow the authority of that case, and carriers have been at a loss as to how far they might properly comply with the judgments of lower courts (sometimes differing upon the same question of construction) requiring the carrier to place one construction or another upon its tariffs.

The Merchants Elevator Company brought an action against these petitioners in the Municipal Court of the City of Minneapolis to compel a refund of charges collected by the petitioners amounting to $5.00 per car for reconsigning or diverting cars of grain from their original billed destination to other points.

The governing tariff admittedly provided for such a reconsigning charge on traffic in general, but provided that such charge should not apply to "grain held for inspection or disposition orders incident thereto at billed destination or at point intermediate thereto."

In this case the billed destination was Willmar, Minnesota. The grain was inspected there but or-

ders were not furnished for disposition at Willmar or at any intermediate point. On the contrary, the cars were reconsigned to another city and the reconsigning charge was accordingly assessed and collected.

The plaintiff claimed that the phrase "at billed destination" should be read as though it occurred immediately after the word "inspection" and as modifying it, and that as the inspection was at billed destination the reconsignment should be free. Defendants claimed that the phrase "disposition at billed destination" should be read together as referring to orders for switching the cars to some mills or industries at Willmar, and that where the cars were reconsigned to other cities, the usual reconsignment charge should apply on grain as well as on other commodities. The defendants offered evidence to show that this construction not only accorded with gramatical rules but was more consistent with the history of the tariff and with other provisions therein.

As soon as it appeared upon the trial that the case called for an adjudication of a bona fide dispute as to tariff construction, the defendants moved to dismiss the action for want of jurisdiction, claiming and specially setting up under the terms of the Interstate Commerce Act of the United States immunity from the jurisdiction of the state court and the right and privilege of having the issues determined in the first instance by the Interstate Commerce Commission. The decision was against such right, privilege and immunity. The defendants'

motion was denied and the court rendered judgment in favor of the plaintiff upon the merits. The decision was affirmed by the Supreme Court of the State of Minnesota, by decision rendered December 3, 1920, in the case of Merchants Elevator Company, Respondent, vs. Great Northern Railway Company and the United States Railroad Administration, Walker D. Hines, Director General of Railroads, Appellants, Docket No. 21910 in said court. The petitioner John Barton Payne is the successor in office of the said Walker D. Hines.

The amount involved in this particular suit is only $80.00, but some $15,000 worth of exactly similar claims are now pending against the defendants and will be determined by the action of the court in this case. However, it is the much larger and more extensive question of the jurisdiction of the court to award judgment in an action of this character that your petitioners desire to present to this court.

Your petitioners aver that the said Supreme Court of the State of Minnesota, as well as the Municipal Court of the City of Minneapolis, erred in denying your petitioners' motion to dismiss said action for want of jurisdiction to enter judgment upon the merits of said action; that each of said courts erred in entering judgment requiring your petitioners to refund to the Merchants Elevator Company moneys lawfully collected for carrier service according to the terms of your petitioners lawfully published tariffs; that the payment of said judgment will result in an unlawful discrimina-

tion in favor of said Merchants Elevator Company and against other shippers who have paid the same charges; and that said decision is contrary to the terms of the Interstate Commerce Act of the United States and to the decision of your honorable court in the case of American Tie Company vs. Texas & Pacific Railway Company supra.

Your petitioners have herein no right of appeal to or writ of error from this honorable court. Your petitioners present herewith as a part of this petition a brief showing more fully their view upon the question involved and a certified copy of the entire transcript of record in the said case, including the proceedings in the said Supreme Court of the State of Minnesota.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this court directed to the Supreme Court of the State of Minnesota, commanding said court to certify and send to this court on a day certain, to be therein designated, a full and complete transcript of the record and all proceedings of the said Supreme Court of the State of Minnesota, and of the Municipal Court of the City of Minneapolis in this case, to the end that said cause may be reviewed and determined by this court, as provided by law, and that your petitioners may have such other and further relief or remedy in the premises as to this court may seem appropriate, and, that the said judgment of the said Supreme Court of

the State of Minnesota may be reversed by this honorable court.

Respectfully submitted,

JOHN F. FINERTY,
Attorney for John Barton Payne,
Director General of Railroads.

F. G. DORETY,
Attorney for Great Northern
Railway Company.

# Supreme Court of the United States.

OCTOBER TERM, 1920.

---

GREAT NORTHERN RAILWAY COMPANY AND JOHN BARTON PAYNE, Director General of Railroads,
*Petitioners,*

vs.

MERCHANTS ELEVATOR COMPANY,
*Respondent.*

---

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

---

The decision of the court below is contrary to the spirit and reasoning of this court in the case of Texas & Pacific Railway Co. vs. Abilene Oil Co., 204 U. S. 26, and in Loomis vs. Lehigh Valley R. R. 240 U. S. 43. It is contrary to the letter of the decision in the American Tie Co. vs. Texas & Pacific Railway Co. 234 U. S. 138. We venture to affirm that either the decision of the state court is wrong or else the decision and language in the American Tie Company case is misleading and should be reversed or explained.

In the American Tie Company case, the Railway Company had a published tariff rate on lumber. The plaintiff tendered to it for shipment a carload of railway ties which the defendant refused to receive upon the ground that it had no tariff rate applicable. The only question of issue between the parties was as to the meaning of the word "lumber." We venture to say that there is no dictionary definition of the word "lumber" which would not include sawed timbers eight feet long and seven by nine inches in diameter to be used for supporting railway rails. Nevertheless, the defendant contended that the word "lumber" should be strictly construed, and should not be applied to cover such a distinct and specific commodity as a railway tie. If the issue as to the construction to be placed upon this word had not been involved, the jurisdiction of the court would not and could not have been questioned. It was questioned, and denied by this court solely upon the ground that this question of construction of the tariff was involved.

The Tie Company contended that while in doubtful cases, the necessity of uniformity and the danger of diversity and conflict might require previous action by the Interstate Commerce Commission in order to prevent one rule in one jurisdiction and another in another, still in the case before the court this rule should not be applied because it was so plain that the word "lumber" as used in the tariff should include cross-ties, and that, therefore, there

was no reason to proceed primarily before the Commission. This court said on page 147:

> "We need not pause to point out the *palpable error of law* which the proposition involves since on the face of the record it is apparent that the assumption of fact upon which it rests is absolutely without foundation." (Italics ours.)

The legal proposition which was being advanced was that where the question of construction was very simple and clear no previous action by the Commission should be required. The court refers to this as a "palpable error of law."

This decision was entirely in accord with the spirit and reasoning of the Abilene Oil Company case and the Loomis case supra. The following language from the Loomis case is particularly applicable in the present case:

> " * * * the preservation of uniformity and prevention of discrimination render essential some appropriate ruling by the Interstate Commerce Commission before it may be submitted to a court. See Penna. R. R. v. Puritan Coal Co., supra, pp. 128, 129; Penna. R. R. v. Clark Coal Co., supra, pp. 469, 470.
>
> If in respect of interstate business the courts of New York may determine, as original matters, rate-making problems, those in other states have like jurisdiction. The uncertainty and confusion which would necessarily result, is manifest. Ample authority has been given the Commission, in circumstances like those here shown, to administer proper relief, and in connection therewith to approve some gen-

> eral rule of action. In so doing it would effectuate the great purpose for which the statute was enacted."

In the present case, about the strongest argument that can be made against the imposition of the reconsigning charge is that the construction is doubtful, that reasonable minds might differ and that, therefore, the construction should be against the Railway Company. If it be conceded that the tariff is doubtful, and that reasonable minds might differ, it follows that shippers in one jurisdiction may be held subject to pay a $5.00 reconsigning charge on grain, while shippers in another jurisdiction may be freed from this charge. In other words, all of the evils of lack of uniformity and discrimination pointed out in the Abilene Oil case and the Loomis case would exist if the decision of the state court were to be sustained in the present action.

In Cheney vs. Boston & Maine R. R. 116 N. E. 411, at 412, the court said:

> "At the argument in this court the defendant for the first time took objection to the jurisdiction of the court on the ground that the construction of the defendant's tariff on interstate commerce filed with the Interstate Commerce Commission was a matter of which no state court had jurisdiction until the true construction of it had been passed upon by the Interstate Commerce Commission."

In Poor vs. Western Union Telegraph Company, 196 S. W. 28, at 31 the court said referring to a tariff stipulation:

> "Nor is the question of the reasonableness or of the real purpose and effect of such a limitation open to our consideration, since that is a matter for the Interstate Commerce Commission to pass upon."

On the other hand, the Circuit Court of Appeals for the Fifth Circuit in the case of National Elevator Co. vs. C. M. & St. P. R. R. Co., 246 Fed. 588, and the Supreme ourt of the State of Minnesota in a previous decision of Reliance Elevator Co. vs. C. M. & St. P. R. R. Co., 139 Minn. 69, have construed the American Tie Company case as having some other meaning than that which to us, at least, seems to be apparent upon its face. These courts and some other lower courts have sustained the jurisdiction of the state courts and the lower federal courts to resolve a bona fide dispute of tariff construction without previous action by the Commission. Apparently without intending any disrespect to or departure from the rule of this court in the American Tie Company case, they have adopted a rule which seems to be diametrically opposed to it. In Massachusetts and Texas at least, and presumably before this forum, an action of the character of this one would have been dismissed for want of jurisdiction. In Minnesota and perhaps some other states, the courts apparently intend to maintain their jurisdiction and to enforce what must necessarily be their varying and conflicting views as to the charges which shippers must pay for various services. We submit that if the Supreme Court is correct in its view, the carriers

should not be embarrassed by the apparently contrary language and decision of the American Tie Company case. If the American Tie Company case, as understood by us, is the law, state courts and the lower Federal courts should plainly be told that the construction which they have placed upon it is erroneous. We believe that it is of the utmost importance that a writ of certiorari be granted, to the end that what still seems to be a disputed and perplexing question may be determined once and for all. We believe that that uniformity in the treatment of shippers and in the charges assessed against them, which has been striven for by the framers of the Interstate Commerce Act, and which has been so carefully guarded by this court in its decisions cited above, is imperilled by the decision of the Supreme Court of Minnesota, and invoke the action of this court for the further protection of that principle.

Respectfully submitted,

JOHN F. FINERTY,
F. G. DORETY,
Attorneys for Petitioners.